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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/564,109

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Pascal Fourcade

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EXAMINER

LENIHAN, JEFFREY S

ART UNIT

PAPER NUMBER

1765

MAIL DATE

DELIVERY MODE

12/08/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/564,109	<b>Applicant(s)</b> FOURCADE, PASCAL	
	<b>Examiner</b> Jeffrey Lenihan	<b>Art Unit</b> 1765	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 24 September 2010.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 8-15, 17-21 and 23-28 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8-15, 17-21 and 23-28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

1. This Office Action is responsive to the amendment filed on 9/24/2010.
2. The objections and rejections not addressed below are deemed withdrawn.
3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office Action.

### ***Claim Rejections - 35 USC § 103***

4. Claims 8-15, 17-21 and 23-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nabeta et al, US4302554 (of record), in view of Marechal, EP1312624 (of record).
5. The rejection stands as per the reasons outlined in the previous Office Action, incorporated herein by reference (for claims 8-15, 17-21, and 24-27).
6. Regarding claim 23: The limitation that the claimed invention comprises more than 50% by weight of the polyethylene component reads on values that only a fraction of a percent greater than 50%-for example, 50.1%. As discussed in previous Office Actions, the composition of Nabeta comprises 2.5 to 50% by weight of the olefinic polymer. It has been held that a *prima facie* case of obviousness exists where the claimed ranges and the prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties, see *Titanium Metals Corp. of America v. Banner* 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985). Barring a showing of factual evidence demonstrating the criticality of the claimed range, one of ordinary skill in the art would reasonably expect that the properties of the prior art

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composition would not be materially different from those of the claimed invention wherein the polyethylene content is only marginally greater than the prior art value of 50%.

7. Claims 8-11, 13, 14, 17, 18, and 24-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wilkie et al, US6022612 (of record), in view of the K RESIN ® DK11 product data sheet, published by Chevron Phillips Chemical Company in January 2001 (of record).

The rejection stands as per the reasons outlined in the previous Office Action, incorporated herein by reference.

8. Claims 12 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Wilkie et al, US6022612 (of record) and the K RESIN ® DK11 product data sheet (of record) as applied to claim 8 above, and further in view of Marechal, EP1312624 (of record).

The rejection stands as per the reasons outlined in the previous Office Action, incorporated herein by reference.

9. Claims 8-15, 17-19, 24, 25, and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ishii et al, WO 01/15897 (of record), in view of Marechal, EP1312624 (of record).

The rejection stands as per the reasons outlined in the previous Office Action, incorporated herein by reference.

### ***Response to Arguments***

10. Applicant's arguments filed 9/24/2010 have been fully considered but they are not persuasive.

11. The rejection of claims over Nabeta in view of Marechal: Applicant argues that there is no motivation to utilize the metallocene catalyzed polyethylene of Marechal rather than the olefinic polymer of Nabeta in producing the film of US4302554; this is not persuasive. Both Nabeta and Marechal are directed towards the preparation of packaging films from compositions comprising ethylene (co)polymers. As noted above, it was known in the art that films comprising ethylene (co)polymers prepared using bridged metallocene catalysts are characterized by improved extrusion stability; it therefore would have been obvious to one of ordinary skill to use the metallocene catalyst of Marechal to prepare the olefinic polymer of the composition of Nabeta to obtain this result.

12. In response to applicant's argument that one of ordinary skill would not be motivated to choose the metallocene catalyst of Marechal to improve the peelability of the film, the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

13. Regarding the allegedly unexpected results: Applicant can rebut a prima facie case of obviousness by showing that there are new or unexpected results relative to the prior art; see *Iron Grip Barbell Co., Inc. v. USA Sports, Inc.*, 392 F.3d 1317, 1322, 73 USPQ2d 1225, 1228 (Fed. Cir. 2004). The examiner first notes that applicant alleges that the olefinic polymer of Nabeta is a Ziegler-Natta catalyzed polymer; however, there is no evidence currently on record to substantiate this allegation. Nabeta does not state that the olefinic polymer is made using a Ziegler-Natta catalyst; rather, Nabeta is silent regarding the type of catalyst used to prepare the olefinic polymer. Regarding test run 35 cited in the rejection of claims, Nabeta only discloses that the olefinic polymer is the commercially available polymer TAFMER-A 4085. There is no evidence on record that demonstrates that this commercial polymer is prepared using a Ziegler-Natta catalyst.

14. Applicant cites the data presented in the instant specification as evidence that the use of the metallocene-catalyzed ethylene polymer yields unexpected results. The examiner notes that the instant specification only states that the polyethylene resins used in the comparative examples are "produced by radical polymerization" (Page 8, lines 5-7); the specification does not disclose the type of catalyst used in the polymerization reaction to prepare the comparative polyethylene resins. In view of 1) the lack of evidence demonstrating that the prior art uses Ziegler-Natta catalysts to prepare the olefinic polymer, and 2) the instant specification's silence regarding the type of catalyst used for the comparative examples, there is currently insufficient evidence on record to establish that the comparative examples provided in the specification

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correspond to the prior art. Applicant therefore has not provided sufficient evidence to demonstrate that unexpected results are obtained relative to the prior art.

15. The rejection of claims over Wilkie in view of K RESIN®: Applicant's argument that the proposed modification destroys Wilkie's intended purpose of providing a matte finish ignores the primary reference's teaching that a matte finish is not required. As noted in the previous Office Actions, Wilkie expressly envisions the production of films that have improved cold seal receptivity only; a matte finish is not required. Furthermore, Wilkie teaches that surface treatment techniques such as corona discharge treatments may be used to create the matte finish when desired. Applicant therefore has not demonstrated that the proposed modification destroys the primary reference's intended purpose.

16. Regarding the chemical composition of the ethylene/olefin copolymer: Applicant argues that the prior art copolymer comprising ethylene and a plastomer is different from the claimed metallocene-catalyzed polyethylene (mPE); the examiner disagrees with this argument. The claim does not require that the mPE is characterized by specific properties (i.e. elastomer, plastomer, etc.); rather, it only requires that it is a metallocene catalyzed polymer.

17. The rejection of claims over Ishii in view of Marechal: Regarding the amount of the block copolymer, It has been held that in the case where the claimed ranges overlap or lie inside ranges disclosed in the prior art, a *prima facie* case of obviousness exists; see *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990) (MPEP § 2144.05). As discussed in the

previous Office Actions, Ishii discloses that the prior art composition may contain 5 to 50% by weight of the block copolymer (a); this range overlaps the claimed limitation that the styrene/butadiene block copolymer is present in an amount of at least 50%. Barring a showing of unexpected results demonstrating the criticality of the claimed range, it would have been obvious to one of ordinary skill in the art at the time the invention was made to prepare a composition comprising the claimed amount of styrene/butadiene block copolymer, as Ishii expressly teaches that the prior art composition may contain 50% by weight of block copolymer (a).

18. Applicant's arguments that there is no reason to modify the teachings of Ishii and the allegedly unexpected results are not persuasive per the same rationale outlined above with respect to the rejection of claims over Nabeta in view of Marechal. Similar to Nabeta, the examiner notes that Ishii does not state that the ethylene/olefin random copolymer is a Ziegler-Natta catalyzed polymer, nor is there evidence currently on record to establish that the commercial resin used in the prior art examples is prepared using a Ziegler-Natta catalyst.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey Lenihan whose telephone number is (571)270-5452. The examiner can normally be reached on Monday through Thursday from 7:30-5:00 PM, and on alternate Fridays from 7:30-4:00 PM.



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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James J. Seidleck can be reached on 571-272-1078. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ Irina S. Zemel/  
Primary Examiner, Art Unit 1765

/Jeffrey Lenihan/  
Examiner, Art Unit 1765

/JL/